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Before the
SURFACE TRANSPORTATION BOARD

Ex Parte No. 582 (Sub-No. 1)
MAJOR RAIL CONSOLIDATION PROCEDURES

COMMENTS

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Washington DC 20036

Attorney for John D. Fitzgerald

Due Date: May 16, 2000

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John D. Fitzgerald,^{1/} for and on behalf of United Transportation Union-General Committee of Adjustment (GO-386), submits these comments in response to Advance Notice of Proposed Rulemaking (ANPR), dated March 30, 2000 (served March 31, 2000). 65 Fed. Reg. 18021-26 (April 6, 2000). The ANPR seeks public comments on modifications to Surface Transportation Board (STB) regulations at 49 CFR 1180.0-1180.9, governing proposals for major rail consolidations.

Background

1. This ANPR is a sequel to the STB's March 17, 2000 decision in Ex Parte No. 582, Public Views on Major Rail Consolidations (Public Views), wherein the STB had sought comments on the effect of railroad consolidations on the financial condition of the railroad industry, and its ability to provide reasonable service, and "any other relevant comments." UTU (GO-386) was an

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active participant in Public Views, filing comments on February 29, 2000 in response to the STB's invitation of January 21, 2000 (served January 24). 65 Fed.Reg. 4568-70 (January 28, 2000).

Public Views, in turn, had been triggered by a notice filed December 20, 1999, by The Burlington Northern and Santa Fe Railway Company (BNSF) and Canadian National Railway Company (CN) that they would file an application for common control. In response to the BNSF/CN notice, the Board on December 27, 1999, had instituted a proceeding,^{2/} and on February 9, 2000 (served February 10)^{3/}, invited comments as to procedures which might be followed by the agency in processing the proposed application. Finance Docket No. 33842, Canadian National Railway Company, Grand Trunk Western Railroad Incorporated, Illinois Central Railroad Company, Burlington Northern Santa Fe Corporation, and The Burlington Northern and Santa Fe Railway Company--Common Control. (BNSF/CN).

UTU (GO-386) was active in BNSF/CN, filing comments on March 1, 2000.^{4/}

2. The instant ANPR proposes to revisit the STB's merger rules, but the public is not asked to comment upon specific proposals--for there are none on the table at this time. The STB explained in Public Views (3/17/00, at 3 n.6), the procedure and purpose of this forthcoming proceeding:

2/ 65 Fed. Reg. 318 (January 4, 2000).

3/ 65 Fed. Reg. 7610-12 (February 15, 2000).

4/ UTU (GO-386) also sought reconsideration of the mandatory diskette requirement imposed in BNSF/CN by the STB. The Board on February 9, 2000 (served February 10), denied the UTU (GO-386) petition. BNSF/CN, Decision No. 5).

In particular, within 20 days we will issue an advance notice of proposed rulemaking (ANPR) suggesting areas in which new merger rules can be developed addressing the concerns that have been raised. (We are not in a position to propose specific rules at this time because, while several parties raised broad issues of concern, specific rule changes were not the focus of our hearing.) We will provide a total of approximately 60 days for comments and replies to the ANPR, and then, within an additional 120 days, we will issue a notice of proposed rulemaking (NPR). We will provide a total of 100 days for comments, replies, and rebuttal with respect to the NPR, and then, within an additional 150 days, we will issue final rules (a total of approximately 15 months from now).

The ANPR issued March 31, 2000, reiterated that the purpose of the ANPR is exploratory. ANPR at 2:

As indicated in our March 17 decision in STB Ex Parte 582 (slip op. at 3n.6), we are not in a position to propose specific rules at this time because, while several parties raised broad issues of concern, specific rule changes were not the focus of our hearing. Instead, we announced that we would be issuing this advance notice of proposed rulemaking (ANPR) to explore in more detail how our merger rules can and should be revised.

This commentator earlier submitted extensive comments in Public Views with respect to a number of areas of concern involving railroad consolidations.^{5/} To a certain extent, this response to the ANPR tracks the earlier comments.

I. A PROPER GRASP OF THE HISTORICAL DEVELOPMENT OF RAILROAD CONSOLIDATIONS IS ESSENTIAL FOR ANY ATTEMPT TO REVISE POLICY OR REGULATIONS.

The ANPR attempts a brief historical discussion of the STB's current regulations governing railroad consolidations. (ANPR 2-4). Unfortunately, the STB errs in asserting the current merger regulations were adopted soon after passage of Staggers Act of

5/ See: Comments of John D. Fitzgerald, dated February 29, 2000.

1980, and that a purported financial distress of the railroad industry leading up to enactment, and service failures, were due to an overly restrictive regulatory system that limited carrier ability to rationalize excess capacity. Further, the STB claims that its merger regulations were aimed at reducing capacity, so long as competition, access to essential service, and other public interest goals are not degraded. It appears that the ANPR to a certain extent carries forward similar conclusions from Public Views, 3/17/00, at 6.

1. Staggers Act of 1980. The current STB regulations, particularly those governing Class I railroad mergers, came about as a result of the 4-R Act of 1976,^{6/} not Staggers Act of 1980^{7/} as claimed by the ANPR. The major change made by the 4-R Act in the merger provisions was the establishment of time frames to govern consolidation proceedings, which previously had never existed. These time periods were altered somewhat by Staggers Act,^{8/} but the basic change was the 4-R Act, not the Staggers Act.

The ICC's regulations clearly indicate the 4-R Act as the major source, with the Staggers Act as merely imposing more stringent deadlines. See: Railroad Consolidation Procedures, 363 I.C.C. 200 (1980), and 363 I.C.C. 767, 768 n.5 (1980).

^{6/} Railroad Revitalization and Regulatory Reform Act of 1976, §§ 402, 403. See: 90 Stat. 31, 62-66 (1976).

^{7/} Staggers Rail Act of 1980, § 228; 94 Stat. 1895, 1931-34 (1980).

^{8/} The 1980 legislation also established separate standards and procedures for transactions other than the merger or control of two or more Class I carriers, but these lesser transactions are not the subject of this ANPR.

The academic community, or at least an important segment thereof, recognizes that 1976, rather than 1980, was the watershed year. See: Stone, Richard D., The Interstate Commerce Commission and the Railroad Industry (Praeger, 1991).

There is nothing in the 1976 amendments to the former 49 U.S.C. § 5(2) to suggest an overly restrictive ICC was unduly limiting the ability of railroads to carry out unification. It was not merger decisions, but a perceived delay in decisionmaking, which was an objective of the 4-R Act. Indeed, the Penn-Central merger decision clearly brought about the 3-R,^{9/} 4-R, and Staggers Acts.^{10/}

2. Merger Regulations. The current STB regulations for processing applications for merger of two or more Class I rail carriers do not appear in need of substantial revision. 49 CFR 1180.2-.9 (1999 ed). This commentor's problem has been with the STB's frequent grant of waiver from these regulations, usually accomplished on an ex parte basis between carrier counsel and agency staff, along with the imposition of a special diskette requirement, accompanied by secrecy and ex parte contacts with Board members.^{11/}

^{9/} Regional Rail Reorganization Act of 1973, 87 Stat. 995 (1974).

^{10/} For certain Penn-Central (Conrail) features of Staggers, see: 94 Stat. 1895, 1948-58, 1962-65 (1980).

^{11/} Many of the public's difficulties with the STB's handling of mergers deal with STB regulations that are not located in the STB's merger rules or regulations (49 CFR 1180.2-.9), but are placed elsewhere. For example, 49 U.S.C. 11324(f) deals with ex parte contacts in Class I rail merger cases, yet such contacts are considered under 49 CFR 1102.2. Pet. to Establish Proc. Regarding Ex Parte Communications, 1 S.T.B. 1083 (1996).

3. Policy Statement. The ANPR appears to have confused merger rules or regulations, on the one hand, with merger policy statement, on the other hand. The ICC first established a policy statement for railroad consolidations in 1978, subsequent to the 4-R Act. Railroad Consolidation Procedures, 359 I.C.C. 195 (1978). The policy statement is codified at 49 CFR 1180.1 (1999 ed).^{12/} The former ICC emphasized that the policy statement is not a regulation. It is merely intended to offer guidance. It is not binding, and can be challenged when applied. 359 I.C.C. at 195-96:

We emphasize that we are adopting a policy statement, not a regulation. The statement is intended to offer guidance to parties planning and participating in railroad consolidation proceedings....It does not establish a binding norm, and it is not finally determinative of the issues or rights which it discusses. When the policy enunciated in the statement is applied in a specific proceeding, parties to that proceeding will have the opportunity to challenge or support the policy through appropriate evidence or argument.

The STB's present policy statement is that established in 1978, as amended over the years. Contrary to the ANPR, the policy statement is not a rule or regulation. It can be challenged anytime.

II. THE "ONE-CASE-AT-A-TIME" POLICY SHOULD BE REMOVED FROM THE STATEMENT.

The STB waived the "one case at a time" policy for the BNSF/CN proceeding. (BNSF/CN, Decision No. 1A, 12/28/99, 5). It should be removed permanently. It was not in the 1978 policy statement, but was added in early 1981 to make way for three new

^{12/} § 1180.1 is captioned, "General policy statement for merger or control of at least two Class I railroads."

major railroad consolidation proceedings. Railroad Consolidation Procedures, 363 I.C.C. 241, 242 & n.2 (1980), and 363 I.C.C.784 (1981).

The ban against cumulative impacts and crossover effects was never appropriate. It has been flatly disapproved by the U.S. Supreme Court in dealing with the Penn-Central and N&W Inclusion proceedings. B. & O.R. Co. v. United States, 386 U.S. 372 (1967); Penn-Central Merger Cases, 389 U.S. 486 (1968).

III. THE POLICY STATEMENT SHOULD
NOT PREFER "END-TO-END MERGERS."

A preference for "end-to-end" railroad consolidations was urged by applicants in BNSF/CN. (BNSF/CN, BN/CN-8 at 2, 3, 4, 8, 10, 13, 18). This should be rejected as a policy statement. Such a preference was advanced by the ICC's Rail Services Planning Office (RSPO) in its Preliminary Report 14-18 (November 1, 1977), and in its Final Report 28-33 (February 1, 1978). However, after extensive public hearings and comment, the "end-to-end" RSPO discussion was not included by the ICC, and the proposal was not adopted. Railroad Consolidation Procedures, 359 I.C.C. 195 (1978).

The ICC has analyzed "parallel" and "end-to-end" railroad consolidations with an even hand. There can be serious anticompetitive consequences irrespective of the type of consolidation. Norfolk Southern Corp.-Control-Norfolk & W. Ry. Co., 366 I.C.C. 171, 216 (1982); Union Pacific-Control-Missouri Pacific; Western Pacific, 366 I.C.C. 459, 505-29 (1982); Milwaukee-Reorganization-Acquisition by GTC, 2 I.C.C.2d 161, 224-35 (1984); Santa Fe Southern Pacific Corp.-Control-SPT Co., 2 I.C.C.2d 709, 764 (1986).

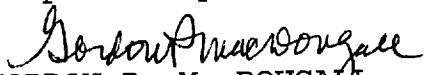
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The STB should revise its procedures for the conduct of railroad consolidation cases. The present procedures for the most part are not contained in the railroad merger regulations, 49 CFR 1180.0-9, but rather are unwritten custom.

This commentor drew attention to such matters in his February 29, 2000 comments in Public Views, at 6-9. These considerations embrace the subjects of public hearings, secret procedures, diskette requirements, and ex parte contacts.

It is desired that the initial comments of other parties be reviewed before this commentor deals at length again on these important procedures. The matter will be revisited in reply comments in the instant proceeding.

Respectfully submitted,


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May 16, 2000

Attorney for John D. Fitzgerald

Certificate of Service

I hereby certify I have served a copy of the foregoing upon all parties of record shown in the STB's service list served April 28, 2000, as amended, by first class mail postage-prepaid.

Washington DC


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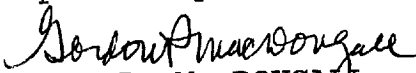
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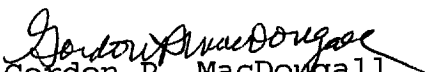
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Attorney for John D. Fitzgerald

Certificate of Service

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